Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

GEORGE GILMORE MARTIN and
JULIA S. MARTIN

Petitioner,

vs.

BANK OF FLOYD

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petition for Writ of Certiorari

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Julia S. Martin
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A. - The Questions Presented for Review:

(1) Does it violate Due Process of Law for a mortgage creditor to be granted a Judgment for more than payment in full?

(2) Does it violate Due Process of Law for a mortgage creditor to be granted a Judgment for an unearned and/or unreasonable attorney fee?

B. - A List of All Parties:

Bank of Floyd

George Gilmore Martin

Julia S. Martin

There are no parent or subsidiary companies to be listed.

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D. - A Reference to the Official and Unofficial Reports of Opinion Delivered in this Case by Other Courts:

There are none.

E. - Statement of the Grounds on Which the Jurisdiction of the Supreme Court of the United States of America is Invoked:

(i) Date of Entry of Judgment Sought to be Reviewed -

April 5, 1994;

(ii) Date of Order Respecting a Rehearing -

June 10, 1994; and

(iii) The Statutory Provision Believed to Confer on this Court Jurisdiction to Review the Judgment in Question by Writ of Certiorari -

28 U.S.C.S. § 1257 (a)

F. - The Constitutional Provision Involved in this Case:

> " ... nor shall any State deprive any person of life, liberty, or property, without due process of law ..." Fourteenth Amendment to the Constitution of the United States of America.

G. - A Statement of the Case:

Before giving any credence to the peculiar judicial determinations of the judicial authorities of the State of Virginia in this case, the Supreme Court of the United States of America may wish to take judicial notice of the political polity of the State of Virginia in the selection of all judicial officers therein:

> No judges are elected by the voters; All Virginia Judges are appointed by a majority vote of the members of the

Virginia legislature; The majority party of the Virginia legislature typically caucuses for the appointment of Judges and decides by a majority vote of the caucus as to whom they shall all appoint for judge; After the caucus votes for whom they will appoint as Judge, the entire majority party then proceeds to the Floor of the Legislature and bloc-votes for whomever received the majority vote of the caucus;

The individual members of the Legislature are nominated to their party's candidacy by a so called "mass meeting" in which the members of a political party in a legislative district are invited to gather together in a meeting to select the respective nominees; The "mass meetings" are generally attended by no

more than 50-200 party members of the legislative district and nominates by a majority vote of those present; The nominees then "run" in a general election of all eligible voters for their office and are elected by plurality (not a majority) of the votes cast in the General Election;

Typically, aspirants for judicial office from a District are nominated for office by the members of the legislature of the District; The nominees are generally determined to be whomever wins a majority vote of an "unofficial" election held by the members of the Virginia Bar Association in the district of the judgeship; All other voters of the district, except members of the Virginia Bar Association, are excluded from this election;

Therefore, all judicial appointees are appointed by a minority of the legislature, i.e. the majority of the majority party who themselves were basically chosen by an insignificant minority of the electorate, i.e. the majority of the members of the "mass meeting"; The Judges are nominated by an insignificant minority of the electorate i.e., the members of the Virginia Bar Association;

Many members of the Virginia Legislature are attorneys, on the retainer of the Economic Power Structure of the State and under the Power of the Virginia Bar Association, or are small business people, such as insurance agents, who sometimes obtain personal business from the Economic Power Structure of the State of Virginia.

The citizens of Virginia hardly have more say in the selection of judges than did the citizens of former Communist Czechoslovakia. The judges appointed in Virginia owe their positions in society and their livelihoods to the Powers-That-Be in Virginia. In a similar manner as the Judges in other former Communist states, the Powers-That-Be in Virginia keep their Judges on the short leash of periodic re-appointment.

This case began when Leon Moore of THE BANK OF FLOYD contacted soon-to-be Virginia Bar President, William R. Rakes, to handle a foreclosure of certain real property belonging to the Martins. Rakes arranged for one of his law partners, William Creech, Jr., to become substituted as a Trustee of the Martins' property. Both Rakes and Creech were members of the politically powerful Roanoke, Virginia, Law

Firm of Gentry, Locke, Rakes & Moore. Creech was also an attorney representing the BANK OF FLOYD. The BANK did not comply with all the legal formalities concerning foreclosure. Also, the foreclosure sale was not conducted with due process of law but was merely conducted privately by Creech himself, as Trustee under a Deed of Trust.

The BANK had previously appraised the Martins' property as being fully worth $863,350. Creech manipulated the "sale" of the Martins' property so that the BANK took the Martins' property for an ostensible price of only $461,600. Creech then, as an attorney for the BANK, sued the Martins falsely claiming that the BANK had lost $159,192.57 on the Martins' loan transaction and that Creech was entitled to a "legal" fee of 25% of the BANK's artificially created "loss". Creech

illegally kicked back his Trustee fee to the Firm of Gentry, Locke, Rakes & Moore which in turn, illegally kicked back a part of the Trustee fee to William Rakes.

Later, in May, 1993, the Martins filed in Atlanta, Georgia, a federal racketeering lawsuit against Virginia Bar president William R. Rakes, William Creech, Jr., The Firm of Gentry, Locke, Rakes & Moore, the Bank of Floyd, Leon Moore, and G. Harris Warner, Jr., (an assistant to Creech).

Shortly thereafter, Creech set a hearing before Roanoke Judge Kenneth Trabue to have the BANK's Virginia "deficiency" lawsuit against the Martins, for the artificially created "loss", set for trial, even though the Martins were only in the middle of discovery. Mysteriously, the Martins' Virginia lawyer, William Quillian, did not appear at the hearing to oppose this motion

to set prematurely the case for trial. Rakes, as the President of the Virginia Bar, has the power to take away Quillian's license to practice law and, therefore, his livelihood. With the Martins unrepresented, Judge Trabue set the BANK's case for trial on July 20, 1993. Apparently, Virginia Bar President Rakes' motive was to seek favorable rulings from Trabue that could help to defend himself in the Martins' racketeering case against him in Atlanta, Georgia.

Quillian, emotionally torn between his fear of antagonizing the powerful Virginia Bar President and his loyalty to his clients, resolved to withdraw as the Martins' lawyer. On July 10, 1993, Quillian informed the Martins for the first time:

1. That the case had been prematurely set to be tried on July 20, 1993; and

2. That he was withdrawing as the Martins' attorney.

When asked by George Martin why he had not opposed the case being prematurely set for trial, Quillian nervously said he had forgotten to attend the hearing. Further, Quillian told Martin that he had scheduled a hearing before Trabue to withdraw as the Martins' attorney and that Trabue wanted George Martin to be available by telephone in case Trabue wanted to speak with him. Quillian called Martin after the hearing and informed Martin that Trabue had allowed him out of the case and had taken the case off the trial calendar but warned Martin that G. Harris Warner, Jr. would probably come back later to have the case reset for trial. Later, on August 15, 1993, without the Martins being notified of a hearing or represented at the hearing, Trabue reset the case for trial on October 15, 1993, and

failed immediately to notify the Martins of what he had done. Toward the end of August, 1993, Trabue belatedly informed the Martins he had reset the case for trial on October 15, 1993.

Meanwhile, Quillian failed to send the Martins his file, thereby impeding the Martins from intelligently approaching other counsel about representing them. In early September, 1993, the Martins made a motion to compel Quillian to turn over his file and a motion to strike the case from the trial calendar of October 15, 1993. At a telephone hearing on September 16, 1993, Trabue refused to grant either motion. Later, Quillian sent the Martins a few documents (but not his complete file). Then, the Martins attempted to find other counsel to represent them.

With only six weeks before trial and after consulting the Roanoke Lawyers Referral Service, the Martins obtained recommendations of lawyers to represent them. The Martins could not find a lawyer to represent them that they trusted. One lawyer candidly told George Martin that:

1. Their case "had political overtones";
2. He thought that Judge Trabue had done some "weird" things in the case;
3. He did not want to sue the Virginia Bar President; and
4. It wasn't that he was "chicken" but he had to continue living in the same community as Rakes, Creech, and the members of The Firm of Gentry, Locke, Rakes & Moore.

On October 7, 1993, the Martins made another motion to strike the case from the Trial Calendar of October 15, 1993, because they could not obtain a fair trial without the assistance of legal counsel. They set

a telephonic hearing on October 13, 1993. On October 13, 1993, Judge Trabue's secretary said Judge Trabue refused to come to the telephone to hear the motion.

On October 15, 1993, the Martins appeared in Roanoke before Trabue for trial. George Martin then renewed his motion to strike the case from the trial calendar. Trabue refused and forced the Martins, against their will, to proceed. He made Julia Martin, a person untrained in law, represent herself without any assistance from George Martin, who Creech and Trabue had previously said "was not one who could represent other persons because he was no longer a member of the Virginia Bar Association".

Next, the Martins moved Trabue to strike the case from the trial calendar because the Bank of Floyd had failed to furnish the

Martins a witness list. Trabue ruled against the Martins. Next, the Martins made a motion for Trabue to withdraw as Judge because he was prejudiced against the Martins. In oral arguments, George Martin mentioned that:

1. Trabue's further rulings in the case could possibly help the powerful Virginia Bar President Rakes and his locally powerful law firm extricate themselves from "alleged violations of federal criminal laws from which they now face severe potential penalties in Atlanta, Georgia.";
2. Trabue's reappointment as Judge "is dependent on the local support of the Roanoke power structure and the Organized Bar"; and
3. After the case, Trabue would still have to live in Roanoke with Rakes and his law firm.

Trabue interrupted Martin and pre-emptorally over-ruled the motion without letting Martin finish his argument on the motion. Trabue then forced the Martins to trial at a tremendous disadvantage to the Martins, all of which Trabue must have known.

The jury panel had no black citizens, even though blacks comprise a meaningful percentage of the population of Roanoke County. The Martins were never furnished with a jury panel list prior to trial. Trabue limited the Martins from asking certain questions of the prospective jurors which might reveal a bias against the Martins. A disproportional number of prospective jurors worked for financial organizations with vast mortgage interests or the local government. Someone whose father did business with the BANK OF FLOYD was on the Panel. Even the Chief Financial Officer for the Shenandoah Life Insurance

Company was on the panel. Rakes had previously defended Shenandoah against a lawsuit by Martin and had been assisted therein by Leon Moore of the Bank of Floyd. Strangely, the lawyer for the Bank of Floyd accepted the original panel without asking them any questions. Later, the first person he struck was an alternate juror to someone on the original panel (the Shenandoah man) that Trabue had reluctantly removed at the Martins' urging.

Trabue admitted into evidence an altered version of the note which the Martins had signed. The note had been altered by the Bank falsely and self-servingly writing on the note that the Martins had a remaining balance due of $159,192.57.

Under cross-examination, the Bank's only witness, Leon Moore, was shown:

1. To have made a false statement under oath in an affidavit;

2. To have approved a false statement in the motion for judgment (the complaint); It was falsely stated that the Bank had requested the Martins to make payment to the Bank of $159,192.57 prior to the filing of the lawsuit [and the incurrance of attorney fees under the note];
3. To have testified falsely that the Martins were only given credits by the Bank of $482,561.88; The credits actually given on the official books and records of the Bank showed credits totaling $664,115.14, which was enough to have paid in full the Martin's loan; and
4. To have been contradicted in his testimony that the Bank was owed $159,192.57 by an official document of the Bank called "end of year loan history" which the Bank had sent to the Martins stating the current

balance owed to the Bank by the Martins was zero.

Trabue falsely informed the jury that Quillian had withdrawn as the Martins' attorney "because of the fact that there was a disagreement ... as to how their case was to proceed". Trabue refused to allow Mrs. Martin to point out the falsity of his statement to the jury.

Trabue refused to allow any testimony concerning the dollar amounts for which the Bank had resold any of the collateral to disinterested third parties. The amounts were substantially higher than the amounts for which the Bank had obtained the collateral from Creech at his "sale". Also, Trabue refused to allow any evidence by the Martins as to the fair market value of the property. All of which would have shown the property's value to have been much more than what the Bank was owed and

substantially higher than Creech's "sale" price.

No evidence was presented by the Bank that it ever exercised its right to accelerate payment under the note to bring about a legal foreclosure as required by Virginia law. Moore admitted later, under cross-examination, that the Bank had never accelerated the balance before starting foreclosure.

The Bank failed to introduce a ledger card to prove any balance due the Bank. Later, the Martins introduced the Bank's computer generated ledger card, an official record of the Bank, which showed a zero balance due the Bank.

Moore admitted that he personally had given smaller credits on the face of the Martins' note than the Bank had given on the Official Books and Records of the Bank.

Further, Moore testified that, if the Martins had been given the same credits on the face of the note as they were actually given on the Official Books of the Bank, then the note would show a zero balance. All of which created a jury issue as to how much was owed.

Moore prevaricatingly testified that Creech

1) was "an independent trustee"

   and

2) "wasn't the Bank's trustee" but admitted under cross-examination that Creech was and is "one of the Bank's attorneys".

Trabue would not let Martin introduce more evidence to impeach further the credibility of Moore, the Bank's only witness, upon whose lack of credibility the Bank's entire case would fall.

On cross-examination by Mrs. Martin, Moore's credibility and believability as a witness was further eroded when he said there were five active bidders at the sale, but the Bank's records and Trustee's records showed two brothers to be the only other bidders. They bid only on a few lots with the Bank as the sole bidder on the bulk of the property. Also, Moore testified that a Strauss Construction Company was a bidder, but the official records of the Bank and Trustee showed no construction company to be a bidder.

With substantial jury issues of fact, because of repeated evidence that nothing was owed the Bank and with reasonable cause not to believe Leon Moore, the Bank's sole witness, Trabue wrongfully took the case away from the jury and decided it himself. He wrongfully ruled for the Bank (and indirectly Bar powerful Rakes). Thereupon,

Mrs. Martin informed Trabue "When we came into this Court, we felt railroaded and we felt that you would take the case away from the jury."

In the Defendants' opinion, Judge Kenneth Trabue's actions demonstrate the corruption of the Virginia Judiciary by the power of the Virginia Bar Association. It appears to the Defendants that the Trial Judge was wrongfully trying to help a local constituent, who happened to be the President of the Virginia Bar Association. As a result, the Defendants feel they became the victims of judicial brutality.

In due time, the Martins appealed to the Supreme Court of Virginia on the basis that the Bank of Floyd had not proven that it was constitutionally entitled to a Judgment and that Trabue's final Judgment violated Due Process of Law. The Virginia Supreme

Court stated on April 5, 1994, that they were "of opinion there is no reversible error in the Judgment complained of". On June 10, 1994, the Virginia Supreme Court refused to grant a rehearing.

H. - The Stage in the Proceedings at Which the Federal Questions Sought to be Reviewed Were Raised:

The questions were essentially raised at trial:

1. by a motion for a directed verdict at the end of presentation of the Bank of Floyd's testimony, which was denied by the Trial Court;

"Mr. Martin: Well, at this point, your Honor, I would like to make a motion that we have a directed verdict in our favor. The evidence is quite clear that we don't owe any money to the Bank. . . and [The Bank has] not even proven any attorney fees... [and]

there [has] been no expert witness or testifying as to the reasonableness of those attorney fees... So, therefore, I move for a directed verdict in our favor, your Honor.

The Court: Motion to strike is overruled. . . and your objection to the Court's ruling is of record." (Trial Transcript pages 163, 164, 165 and 166);

2. After the presentation of the Bank's case, the Martins sought to introduce evidence of the values of the properties acquired by the Bank. The Court would not allow the introduction of this evidence;

"Mr. Martin: So we intend during my case to bring up these issues and to explore fully whether this property did bring a fair price and bring in evidence of values of these properties so that we can have a fair trial of

this case as guaranteed us by the Constitution of the United States.... The Court.... I know you want to be able to preserve that for appeal, Mr. Martin.... As far as the evidence... is concerned, the Court rules in favor of the [Bank].

Mr. Martin: Again, I would note the objection for the record for appeal of your ruling in this matter, your Honor." (Trial transcript pages 173, 175, 186 and 187); and

3. At the conclusion of the trial, the trial Court was notified that the Martins ".... wanted to appeal this into the Federal... Courts on violation of due process.

The Court:.... I think it's just up to you to persuade the Virginia Supreme Court that I have erred....

Mr. Martin:.... So it's the Supreme Court of Appeals.

The Court: Yes, sir.

Mr. Martin: All right."

(Trial Transcript pages 250 and 251). In the Petition for Appeal to the Virginia Supreme Court, the issues were raised in the "Questions Presented" Section of the Petition:

"A. Does it violate the Due Process Clause of the 14th Amendment to the Constitution of the United States of America for a State Court Judge to enter a deficiency judgment against a mortgage foreclosure debtor, unless a mortgage foreclosure creditor proves that... the fair market value of the property foreclosed was less than the amount owed?" (Petition for Appeal - Page 1), and

"B. Does it violate the Due Process clause of the 14th Amendment to the Constitution of the United States

of America for a State Court Judge to enter a judgment awarding attorney fees against a defendant unless the plaintiff proves:

1. The attorney fees were legally incurred by the defendant.
2. The amount of attorney fees incurred; and
3. the amount of attorney fees was reasonable?" (Petition for Appeal - Page 2)

I. - Reasons Relied on for the Allowance of the Writ:

The State Courts of Virginia have decided two important questions of federal law: one question has not been, but should be, settled by this Court; and the other question has been decided by the Virginia Supreme Court in a way that conflicts with applicable decisions of this Court.

These questions are important because there exists over 25,000,000 mortgage loans in the United States of America. There are over 50,000,000 persons personally liable, there on, for over 2.5 trillion dollars of financial exposure. Most likely, this case will concern the rights of more people and define more financial liability than most any other case previously decided by this Court.

I. Does it violate Due Process of Law for a mortgage creditor to be granted a Judgment for more than payment in full?

The first time this question was considered by a member of the United States Supreme Court was in the Federal Circuit Court case of Hatch v. White, 11 Federal cases page 810 (case no. 6,209), decided in 1814. In this case, Justice Story, as the presiding Judge for the New England Circuit, held that:

" ... the mortgagee must be entitled to recover on the note in damages the deficiency of the mortgaged property to pay the debt, calculating its value at the time of the actual extinction of the equity of redemption ...".

In so holding, Justice Story overturned several hundred years of Common Law development which had reached the point of effectively denying deficiency judgments in mortgage foreclosure cases. As pointed out by Justice Story, in the opinion in Hatch v White, there was, at Common Law, no ruling directly on point. But, there were numerous cases that practically precluded deficiency judgments by:

1. Opening the foreclosure and letting in the equity of redemption if the mortgage creditor later sued on the note for a deficiency; Dashwood v. Blythway, 1 Eq.Cas. Abr.317 (English Case);

2. Ruling that after a foreclosure, so long as the mortgagee kept the estate, he must take the pledge as satisfaction, because, by not knowing what it would produce, he could not say anything was due; but if he sold the estate fairly and without collusion for the best price, and it produced less than the debt, he would be entitled to recover on the bond for the deficiency. Took v _____, 2 Dickens 785 (English Case - Lord Thurlow);

3. However, in Perry v. Barker 8 Ves 527, Lord Eldon held that after a foreclosure and sale of the mortgaged estate, the mortgagee had no right to proceed at law upon the attendant bond, because by the sale he had incapacitated himself to reconvey the estate to the mortgagor; and

4. In further proceedings in Perry v. Barker, 13 Ves.197, Lord Erskine held that not withstanding a foreclosure the mortgagee had a right to proceed on his bond; but that such a proceeding entitled the mortgagor to redeem, and if the mortgagee had previously sold the estate and could get it back, equity would allow him time for the purpose. However, it seems to have been his lordship's opinion, that if this could not be done, the mortgagee ought to be restrained from proceeding, and under the peculiar circumstances of the case before him, he decreed a perpetual injunction.

Therefore, at Common Law, Equity practically precluded a mortgagee from obtaining a deficiency judgment after foreclosure.

As pointed out by Justice Story in the opinion in Hatch v White on page 813, Law practically precluded a mortgage creditor from electing to sue on his bond at Law, in lieu of foreclosure in equity, and later levying on the collateral at its appraised value because such an election would extinguish the mortgage, so as to let in other intermediate encumbrances and attachments on the estate.

Therefore, the collective wisdom, of hundreds of years of development in the Common Law Justice System, was practically to preclude deficiency judgments.

In overturning the Common Law in Hatch v. White, Justice Story was rightfully concerned about doing Justice in the particular case before him. Justice Story felt that a mortgage creditor should be allowed to recover payment in full after first giving the mortgage debtor credit for

the value of the mortgaged estate. If the value of the mortgaged estate was equal to or more than what was owed, then the mortgage creditor was paid in full. If the value of the mortgaged estate was less than what was owed, then the mortgage creditor should be able to obtain a deficiency judgment for what was owed over the value of the mortgaged estate.

On its face, this principle appears fair and just. In considering the Common Law restraints on this principle in Hatch v White, Justice Story and his brethern even admitted that "we profess ourselves unable to comprehend the particular principles, upon which in either case a court of equity proceeds to restrain a creditor from pursuing his remedy at law, when by a foreclosure he has not obtained a satisfaction of his debt." However, perhaps what the Lords of the Realm, who were the articulators of the Common Law,

comprehended was:

1. That it is usually a rare case where in a mortgage creditor does not take more collateral value than what is owed. For the most part, mortgage creditors take more value than what they are owed, so in the run of foreclosures they aggregate no net loss, even if they occasionally take a property worth less than what is owed on a particular loan; and

2. That opening the Pandora's Box of deficiency judgments would be unwise, because the Lords of the Realm perhaps recognized that mortgage creditors were primarily astute businessmen who are naturally inclined to try to recover more than what they are owed; After all, it is only good business to maximize one's profits; The Lords, perhaps, comprehended

> that abuse would surely follow if these good businessmen sought to try to receive more than payment in full by employing influential lawyers to obtain deficiency judgments from friendly judges.

In any event, after Hatch v. White, abuse began to follow. As time went by, many state court judges refused to give the mortgage debtor credit for the value of the mortgaged estate. The abuses became so widespread that by the end of the 1930's, numerous state legislatures had enacted varying statutes to remedy the abuses. The state statutes basically followed two lines of approach:

1. Return to the Common Law - California enacted a statute precluding any deficiency judgment under any circumstance concerning the mortgages covered by its statute; and

2. Return to Hatch v. White - Many states such as New York, New Jersey, North Carolina and others enacted statues compelling their state court judges to give the mortgage debtor credit for the value of the property before allowing a deficiency judgment.

Of course, the mortgage creditors, being the good businessmen they were and not wanting to lose an opportunity to be paid more than what they were owed, challenged the constitutionality of these state statutes. This gave the United States Supreme Court an opportunity to visit this area of the Law.

In upholding the North Carolina statute in the case of Richmond Mortgage & Loan Corp. v. Wachovia Bank, 57 Supreme Court Reporter 338 (1937), Justice Roberts speaking for an unanimous U.S. Supreme Court stated:

"The contract contemplated that the

lender should make itself whole, if necessary, out of the security, but not that it should be enriched at the expense of the borrower or realize more than would repay the loan with interest ... The act ... cannot fairly be said to do more than restrict the mortgagee to that which he contracted, namely, payment in full. It recognizes the obligation of his contract and his right to its full enforcement but limits that right so as to prevent his obtaining more than his due."

In upholding the New York statute in the case of Honeyman v. Jacobs, 59 Supreme Court Reporter 702 (1939), Chief Justice Hughes, in another unanimous ruling of the U.S. Supreme Court, held:

"The mortgage was executed to secure payment of that indebtedness. The contract contemplated that the mortgagee

should make himself whole, if necessary, out of the security but not that he should be enriched at the expense of the debtor or realize more than what would repay the debt with costs and expenses of the suit. Having a total debt of $15,771.17, with expenses, etc., of $1,319.03, appellant has obtained through his foreclosure suit the property of the debtor found without question to be worth over $25,000. He has that in hand. We know of no principle which entitles him to receive anything more."

The last case concerning this question to be decided by the United States Supreme Court was Gelfert v. National City Bank of New York, 61 Supreme Court Reporter 898 (1941). The case involved turning away another constitutional challenge to the New York statute by a good businessman trying to be paid more than what he was owed.

Justice Douglas delivered another unanimous decision for the court. In the opinion, he explicated the history and principles of the question:

> "... for about two centuries there has been a rather continuous effort either through general rule or by appeal to the chancellor in specific cases to prevent the machinery of judicial sales from becoming an instrument of oppression. And so far as mortgage foreclosures are concerned, numerous devices have been employed to safeguard mortgagors from sales which will or may result in mortgagees collecting more than their due. The variety of formulae which has been employed to that end is ample evidence not only of the intrusion which advanced notions of fairness have made on the earlier concern for stability of judicial sales but also the flexibility of the standards of fairness themselves.

Underlying that change has been the realization that the price which property commands at a forced sale may be hardly even a rough measure of its value. The paralysis of real estate markets during periods of depression, the wide discrepancy between the money value of property to the mortgagee and the cash price which that property would receive at a forced sale, the fact that the price realized at such a sale may be a far cry from the price at which the property would be sold to a willing buyer by a willing seller reflect the considerations which have motivated departures from the theory that competitive bidding in this field amply protects the debtor.

Mortgagees are constitutionally entitled to no more than payment in full ... They cannot be heard to complain on Constitutional grounds if the legislature

takes steps to see to it that they get no more than that ... [T]here is no constitutional reason why in lieu of the more restricted control by a court of equity the legislature cannot substitute a uniform comprehensive rule designed to reduce or to avoid in the run of cases the chance that the mortgagee will be paid more than once ... The 'fair and reasonable market value' of the property has an obvious and direct relevancy to a determination of the amount of the mortgagee's prospective loss. In a given case the application of a specified criterion of value may not result in a determination of actual loss with mathematical certitude. But 'incidental individual unequality' is not fatal ... So far as mortgagors are concerned, it offers some assurance that they will not be saddled with more than the amount of their obligations."

It is instructive to realize that when Justice Douglas held in Gelfert v. National City Bank, in 1941, that the Law of Land was:

> "that mortgagees are constitutionally entitled to no more than payment in full",

He was doing no more than stating the logical obverse of what Justice Story had held in Hatch v. White, in 1814,when he stated:

> "the mortgagee must be entitled to recover on the note in damages the deficiency of the mortgaged property to pay the debt, calculating its value at the time of the actual extinction of the equity of redemption ..."

The "Law of the Land" is subsumed into "Due Process of Law". Therefore, it violates Due Process of Law for a mortgage creditor

to be granted a judgment for more than payment in full.

Even if these cases had never been decided, Due Process of Law would still preclude a mortgage creditor from obtaining a judgment for more than he was owed.

The United States Supreme Court has stated that "...since it is of the very nature of a free society to advance in its standards of what is deemed reasonable and right and, representing as it does a living principle, 'due process' is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." Frank v State of Maryland, 79 S. Ct. 804 (1959). The U.S. Supreme Court has also stated that "while this clause is new in the Constitution, as a limitation upon the powers of the States, it is old as a principle of civilized

government; it is found in Magna Charta, and, in substance if not form, in nearly or quite all the Constitutions that have been from time to time adopted by the several states of the union." Munn v Illinois, 94 U.S. 123 (1876).

The U.S. Supreme Court has stated that the "Due Process Clause of Fourteenth Amendment was intended to prevent government from abusing its power, or employing it as an instrument of oppression." Collins v City of Harker Heights, 112 S. Ct. 1061 (1992).

The U.S. Supreme Court has also stated that "Appropriate limits on substantive due process come not from drawing arbitrary lines but from careful respect for the teachings of history and solid recognition of the basic values that underlie our society." Moore v City of East Cleveland, 97 S. Ct. 1932 (1977). Likewise, it has

been stated that "substantive due process rights protected by this amendment are not limited to those liberties specifically enumerated in the Bill of Rights, but also include those fundamental concepts of justice which lie at the base of American civil and political institutions." St. Ann v. Palisi, 495 F 2nd 423 (1974).

A Court has stated "Denial of due process is failure to observe that fundamental fairness essential to very concept of justice." Linden v Dickenson, 287 F 2nd 55 (1961). Another court has stated "Due process embodies fundamental concept of fairness that derives ultimately from natural rights of all individuals." Scull v State of Florida, 569 So. 2nd 1251 (1990). Another court has explained that "'Substantive due process' means that state action, which deprives a person of life, liberty or property, must have a rational

basis." Jeffries v Turkey Run Consol.School District, 492.F2d 553 (1974). In Pearson v North East Airlines, Inc., 309 F2d, 553, (1962), certiorari denied 83 S. Ct 726, it was stated "This clause requires not only that there be a deprivation of property but also some unreasonable ... imposition of liability."

It has been stated that "Due process is an element that, when absent, produces reaction given to that which is shocking to universal sense of justice." In RE Hudson, 572 A. 2nd. 328 (1990), Certiorari denied 111 S. Ct. 247. It has been stated also that the "applicable standard in determining substantive due process violation is the 'shock the conscience' test, sometimes expressed in terms of 'fundamental fairness.'" Pfoltzer v County of Fairfax, 775 F.Supp. 874 (1991). Furthermore, it has been enunciated that

"deprivation of an individual's life, liberty, or property interest violate the Fourteenth Amendment if they are such that they shock the conscious." Cooper v Merrill, 736 F.Supp. 552 (1990).

The U.S. Supreme Court stated that "This clause governs any action of state whether through its legislature, its courts, or its executive or administrative officers." Mooney v Holohan, 55 S. Ct. 340 (1935). Furthermore, another Court has stated "Action of state courts and judicial officers in their official capacities is action of state within the Fourteenth Amendment." Jacobs Mfg. Co. v Sam Brown Co., 792 F.Supp. 1520 (1992). Further, "State judges are state actors within meaning of Fourteenth Amendment." People v Garberding, 787 P. 2nd, 154 (1990). Further, the U.S. Supreme Court has enunciated "If ... [something] ... is an

essential element of due process of law, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of this clause." Chicago R. Co. v Chicago, 17 S. Ct. 581 (1897). Specifically, another court has said "if a case between private parties is arbitrarily and capriciously decided in violation of federal principles of law and contrary to undisputed facts, though the court so deciding had jurisdiction over the suit, the judgment may be in violation of this amendment." William v Tooke, 108 F.2nd 758 (1940); certiorari denied 61 S.Ct.8. Also, another court has stated "Judgments which are rendered unauthorizedly deprive defendants of fundamental rights guaranteed them by this amendment." Application of Koufman, 136 F.Supp.626 (1955).

Clearly, there is no rational basis for awarding a deficiency judgment if the value of the property is more than the amount owed the creditor. To do so would be irrational, because there is, in fact, no economic deficiency. Furthermore, for a state judge to enter a deficiency judgment in a case in which the moving party did not prove that the value of the property was less than what was owed would clearly be an unreasonable imposition of liability.

Let us put this situation through the 'shock the conscious' test:

> A lends B $100,000 on a $300,000 property. A forecloses B. A buys the property for $1. Then, A sues B for $99,999.

Does it shock your conscious that A, who has obtained a $300,000 property, should be allowed additionally to obtain a money judgment against B for $99,999? Surely, it

would. Why? Because any judgment award to a mortgage creditor, who has already collected the amount owed, offends fundamental principles of fairness and justice which underlies our society. Furthermore, does it shock your conscious for A to be allowed to obtain a money judgment against B, if A has illegally foreclosed the property? Surely, it offends everyone's fundamental sense of logic and justice that someone should be allowed to benefit from his own illegal action. Lastly, does is shock your conscious that A could be allowed to obtain a money judgment against B, unless the foreclosure were accomplished with due process of law? Yes, again, it is offensive to everyone's sense of justice that a party should benefit from the taking of someone else's property without due process of law being employed in the taking.

The result of applying the 'shock the conscious' test is that substantive due process of law requires a mortgage creditor to establish by sufficient evidence:

1. The foreclosure was legally done;
2. The foreclosure was effectuated with due process; and
3. The value of the property was less than what was owed; as a necessary minimum constitutional prerequisite to obtaining a deficiency judgment against any mortgage debtor.

II. Does it violate Due Process of Law for a mortgage creditor to be granted a Judgment for an unearned and/or unreasonable attorney fee?

The researcher of this brief has not found any decisions by the United States Supreme Court directly concerning this specific question. However, cases concerning the

notions of fairness involving this question, which are the foundation of Due Process of Law, are numerous.

The earliest reported case is Robinson v Loomis, 1 P.F. Smith 78 (1865), which was decided by the Pennsylvania Supreme Court. Justice Strong speaking for the Court held:

> "The 5 per cent, stipulated to be recoverable as fees to the attorney for collection, can in no sense be regarded as a penalty. It was an agreed compensation for expenses incurred by the mortgagee in consequence of the default with the mortgagor."

However, in the case of Daly v Maitland, 88 Pa.384 (1879), the ruling in Robinson v Loomis was specifically overturned by the Pennsylvania Supreme Court. Chief Justice Sharswood held:

"In Robinson v Loomis, it was ruled that such a commission was not a penalty, but an agreed compensation to the mortgagee for expenses incurred by the default of the mortgagor.

It is undoubtedly true that the parties to a contract may lawfully agree that the damages in case of a breach shall be liquidated at a certain amount. Equity will not relieve against such a contract, fairly entered into, unless it is evidently a penalty. This principle of liquidated damages is not applicable, however, to a contract for the loan of money - at least such stipulation is subject to the control of counts of equity. As in the days of Solomon, 'the borrower is servent to the lender', and courts of equity, from the earliest period, have assumed the jurisdiction of relieving the borrower from unreasonable and oppressive stipulations, exacted from his necessities, altogether

apart from statutes against usury. Especially has this always been the case as to mortgages ... The stipulated commission for the attorney may be so far beyond the ordinary rate charged for such services as to require imperatively the interposition of the equitable powers of the Court.

> ...The lender of money on any species of security cannot exact an unreasonable stipulation in the shape of an agreed liquidation of damages. Equity interposes her shield to protect the borrower. The debtor in cases of this kind will readily yield to the demand of the creditor, as he would be apt to regard collection by suit as a remote and improbable contingency ... Whatever is stipulated beyond a reasonable rate should be relieved against on equitable principles."

In the case of Kennedy v Richardson, 70

Ind.524 (1880), the Indiana Supreme Court unanimously held:

> "The contract for payment of attorney fees, in whatever form it may be expressed, is a contract of indemnity merely ... As the contract is one for indemnity only, without regard to its form, of course the holder of such a contract cannot recover, in a suit thereon, any larger sum than will be sufficient to indemnify him."

The Court proceeded to reduce an award of attorney fees of $601, which represent the stipulated attorney fee of 5% of the amount owed, to $125, which was the amount the creditor had agreed to pay his attorney.

In the case of Burns v Scoggin, 16 Fed Rep 737 (1883), the Federal Circuit Court of Oregon held:

"... [T]he validity of the contract being admitted, counsel for the plaintiff contends that the amount of the fee has been fixed by the contract of the parties, and cannot be reduced by the court except upon proof of fraud. But this contract is, in most respects, a peculiar one. It is made between a borrower and lender, at the moment when the want of the latter often puts him in the power of the former, for a payment in the nature of a penalty, with little, if any, expectation on the part of the borrower that the contingency upon which it is to become operative will ever happen. If not a mere cover for usury, it, in effect, concerns the amount of compensation to be paid to an officer of this court for professional services herein by the adverse party, as a substitute for his common law 'costs'. Such a contract is in some sense under

the power of the court, and ought not to be enforced by it, unless it plainly appears to be reasonable and just ...

$2,700 [i.e. 10% of the amount owed] is an exorbitant fee for the conduct of such a case at this; and so exorbitant and out of all proportion to the true or conventional value of the attorney's service, that no court would enforce its payment unless compelled to."

In the case of Broadbent v Brumback, 16 Pac.555 (1888), the Supreme Court of Idaho held:

"The practice of charging, as attorney fees, 10 or 15 per cent against the mortgagor, when a much smaller amount is actually paid to the attorney by the plaintiff, thus wrongfully increasing the burden of the debtor who seeks to redeem,

is discreditable to the profession, and contrary to every principle of equity. The courts should not sustain such fraudulent and iniquitous practice."

Clearly, there can be no rational basis for a judge to enter a judgment granting attorney fees unless the moving party establishes by evidence:

1. That attorney fees were in fact incurred (if no fees were incurred, it would be irrational to award attorney fees);
2. The amount of attorney fees actually incurred (if the amount actually incurred is not established, again there can be no rational basis for an award); and
3. The actual amount incurred is reasonable (clearly, the award of an unreasonable attorney fee is not rational).

Secondly, for a judge to enter a judgment in a case wherein the moving party had not proved the amount of fees actually incurred to be reasonable would be, per se, an unreasonable imposition of liability.

Finally, let us put this situation through the 'shock the conscious' test:

> A sues B for an attorney fee. At trial, A introduces evidence that an attorney fee may have been incurred but fails to introduce any evidence as to the amount of the fee actually incurred or any evidence as to the reasonableness of the amount of the fee incurred.

Under these circumstances would it shock your conscious if A obtained a money judgment of $42,545.82 against B for attorney fees? Surely, it would. Why? Because it violates our fundamental sense of justice for an unearned and unreasonable

attorney fee to be judicially imposed on any citizen of this country. Also, it offends our sense of universal justice for an attorney fee to be awarded without a rational basis to support its award. There is just something fundamentally unfair and shocking about awarding an attorney fee of $42,545.82 without any proof as to the amount of fee being incurred or reasonable. The result of the 'shock the conscious' test is that substantive due process of law requires a party moving a court to enter a judgment for of an attorney fee to introduce sufficient evidence proving that:

1. an attorney fee was actually incurred;
2. the amount of the attorney fee actually incurred; and
3. the amount of the fee incurred is reasonable.

Otherwise, the judgment necessarily violates substantive due process and is unconstitutional.

The United States Supreme Court should end the fraudulent and iniquitous practice of state judges entering judgments for unearned and unreasonable attorney fees. It is a discredit to the legal profession and undermines confidence in our Government. Due Process of Law requires that Government not be an instrument of oppression or a vehicle of looting.

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K. - Appendix

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VIRGINIA

IN THE CIRCUIT COURT FOR THE COUNTY OF ROANOKE

THE BANK OF FLOYD Plaintiff	)	
v.	)	JUDGMENT ORDER
GEORGE GILMORE MARTIN and JULIA S. MARTIN Defendants.	)	CL 92-95

On Friday, October 15, 1993, came the plaintiff, The Bank of Floyd, by its president, R. Leon Moore, and by counsel, and came the defendants, George Gilmore Martin and Julia S, Martin, in person, neither of them being represented by counsel; and after preliminary motions ruled upon by the Trial Court as reflected in the stenographic transcript of evidence, and duly objected and excepted to by the defendants, the issue was joined. Thereupon, came a jury summoned in the manner prescribed by law, from which the

defendants challenged for cause, Charles Daniel Cox, III and he was replaced by Fred William Davis. Thereafter counsel for the plaintiff and the defendants in person exercised their peremptory strikes, leaving the following as the jury for the trial of this action to wit: Shirley Millner, John Hatcher, Gary Dogan, Randall Hill, Charles Hofer, Donita Peverall and Martha Webb, who were sworn to truly try the issue joined, and thereupon the plaintiff, after opening statements, opened with its evidence and rested.

Whereupon, the defendants moved the Court to strike the plaintiff's evidence and for summary judgment in favor of the defendants, which was overruled by the Court and the defendants duly objected to for reasons set forth in oral argument and reflected in the stenographic transcript of evidence and other incidents of trial.

Thereafter, the defendants presented their evidence and rested. Whereupon, the plaintiff moved the Court to strike the defendants' evidence, and for entry of summary judgment in favor of the plaintiff. The motion for the plaintiff was sustained, by reason that only one witness, Leon Moore, the president of The Bank of Floyd, was the only witness called by both the plaintiff and defendants and his testimony being uncontradicted, there was no issue of fact for the jury to decide to which said ruling the defendants duly objected and excepted.

Thereupon, the jury was discharged by the Court and the defendants moved the Court for time for additional motions, which permission the Court denied and to which the defendants duly objected and excepted.

It is therefore ADJUDGED and ORDERED that the plaintiff does have and recover of the defendants, as principal and interest through Friday, October 15, 1993, the sum of $170,183.27 and attorneys fees in the amount of $42,545.82.

And the Clerk of this Court shall forthwith certify a copy of this Order to all counsel of record.

All matters having been accomplished, this matter shall be stricken from the docket of this Court and place among the ended files.

ENTER this 9th day of December, 1993.

K. E. TRABUE

Judge

I request entry of this Order:

Alton B. Prillaman
Alton B. Prillaman, Esquire
Jolly, Place, Fralin & Prillaman, P.C.
3912 Electric Rd., S. W.
Roanoke, VA 24018
(703) 989-0000

We have seen this Order and object to its entry:

K.E.T
George Gilmore Martin, pro se
6210 Aberdeen Drive
Atlanta, GA 30328
(404) 303-8618

K.E.T
Julia S. Martin, pro se
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(404) 303-8618

Pursuant to Rule 1:13 and pursuant to the telephone conference with the Court on December 6, 1993 at 1:45 p.m., endorsement by the Defendants, George Gilmore Martin and Julia S. Martin, pro se, is hereby dispensed with. From the conference call, the Defendants' objections and exceptions to the entry of this Order with reference to 25% attorneys fees are duly noted by the Court as well as their objections and exceptions to this Final Order.

K.E.T.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday, the 5th day of April, 1994.

George Gilmore Martin, et al., Appellants,

against Record No. 940278
Circuit Court No. CL92000095

The Bank of Floyd, Appellee.

From the Circuit Court of Roanoke County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday, the 10th day of June, 1994.

George Gilmore Martin, et al., Appellants,

against Record No. 940278
Circuit Court No. CL92000095

The Bank of Floyd, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 5th day of April, 1994 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

Supreme Court, U.S.
FILED
OCT 7 1994

No. 94-0473

In The

Supreme Court of the United States

October Term, 1994

GEORGE GILMORE MARTIN and JULIA S. MARTIN,

Petitioners,

vs.

BANK OF FLOYD,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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No. 94-0473

In The

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October Term, 1994

GEORGE GILMORE MARTIN and JULIA S. MARTIN,

Petitioners,

vs.

BANK OF FLOYD,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Bank of Floyd, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners George Gilmore Martin and Julia S. Martin.

OPINIONS BELOW

The Circuit Court for Roanoke County, Virginia, entered its Final Order in this case on December 9, 1993. The case number is 92-95. The Virginia Supreme Court denied the Martins' Petition

for Appeal and subsequent Petition for Rehearing. None of these opinions are published. They are reproduced in the appendix to the Martins' Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Respondent respectfully avers that Petitioners' Statement of the Case is replete with allegations of collusion among members of the Virginia judiciary, allegations which are irrelevant and immaterial to the facts at issue. Further, while Petitioners' Statement correctly states that the Petitioners sought to introduce evidence at trial and were denied, it fails to state the reasons therefore. In an attempt to clarify the record, Respondent submits the following "Statement of the Case." All references are to the Record or Transcript of Trial ("Tr.").

On May 15, 1990, George Gilmore Martin and Julia S. Martin (hereinafter the "Martins") executed an interest-bearing note in favor of the Bank of Floyd (hereinafter the "Bank") in the principal amount of $630,000. According to the terms of the note, payments were to be made in 24 consecutive monthly installments of principal and interest, beginning June 15, 1990, with the entire unpaid balance due May 15, 1992. The note also provided for continuing interest until paid, plus the payment of collection costs and attorneys' fees in the amount of twenty-five percent (25%) of the outstanding balance (Tr. 114-115). The note was secured by a deed of trust bearing the same date and recorded in the Clerk's Offices of the Circuit Courts for both the County of Roanoke and the City of Salem.

The Martins defaulted on the note and the deed of trust securing the note was subsequently foreclosed on in early December, 1991. The outstanding balance on the note as of that time was $641,754.45. The real property, the majority of which was purchased by the Bank at the foreclosure sale, brought

$482,561.88. The proceeds of the sale were applied to the balance due on the note, leaving a deficiency of $159,192.57 as of December 4, 1991 (Tr. 116, 152-153, 161).

On March 6, 1992, the Bank filed suit in the Circuit Court of Roanoke County against the Martins for the deficiency, plus interest and attorneys' fees as provided for in the note (Record 1-7). The Martins retained counsel and, with leave of court, filed a late Answer and Grounds of Defense to the Motion for Judgment. In their Answer, the Martins admitted that they executed the May 15, 1990 note, with the terms as alleged in the Motion for Judgment, but denied that they owed the Bank any additional monies. The Martins did not challenge the validity of the foreclosure, nor did they raise any issues regarding due process. Even through entitled "Answer and Grounds of Defense", the Martins' responsive pleading merely denies the allegations contained in paragraph 4 of the Motion for Judgment regarding the issue of the note's being in default, and further denies "each and every allegation not specifically admitted herein" and demands "strict proof of each such allegation" (Record 15-17).

On the morning of October 15, 1993, prior to the commencement of the trial,[1] the court entertained preliminary motions. The Martins moved for a continuance, stating that discovery was not complete and that they were not represented by counsel and therefore could not receive a fair trial. The court overruled the motion, and, in a rather lengthy explanation of its reason, informed the Martins that there was a general denial to the Motion for Judgment, that no affirmative defenses were filed, that no objections to discovery were filed, that the case was ready for trial and that the case would be tried according to the pleadings as

---

1. The case was originally set for trial by jury on July 20, 1993, but was continued until October 15, 1993, at the request of counsel for the Martins who sought leave to withdraw from the case (Record 57-58).

filed.[2] The court further stated that the Martins had had ample time to retain counsel (Tr. 13-35). The Martins then moved the court for a continuance on grounds that the Bank had failed to produce a witness list prior to trial after being so requested, maintaining that this failure prejudiced them by denying them time to prepare cross examination. The court overruled this motion, but stated that it would grant the Martins an opportunity to interview any witness whom they considered a surprise (Tr. 35-42, 48-49). Finally, the Martins moved that the trial judge recuse himself in that he would not be fair and impartial and the Martins' rights guaranteed by the Fourteenth Amendment would be violated. This motion, too, was overruled. The court noted the Martins' exceptions to its rulings (Tr. 50-53).

Upon conclusion of the preliminary motions, a jury of seven was selected. The Martins objected to the panel, stating that they could not get a fair trial in Roanoke County. The court noted their objection for the record (Tr. 101).

For its case in chief, the Bank called its president and chief executive officer, Leon Moore, as its only witness. Moore's testimony corroborated the allegations contained in the Bank's Motion for Judgment: the Martins had executed a note in favor of the Bank; they had defaulted in the payment of that note; the outstanding balance on the note as of December 4, 1991 was $641,754.45; the deed of trust securing the note was foreclosed on the real property sold, resulting in total credits to the Martins' account of $482,561.88; the proceeds from the sale plus the other credits for payments made to the Martins' account did not fully repay the debt incurred, resulting in a deficiency of $159,192.57; the note called for continuing interest until paid, and said interest, from December 4, 1991, through October 15, 1993, was computed

2. At no time, during either preliminary motions or trial, did the Martins request leave of court to amend their Answer so as to include affirmative defenses.

to be $10,990.70; and the terms of the note also provided for attorneys' fees in the amount of 25% of the unpaid balance, which were computed to be $42,545.82 (Tr. 114-117, 151-154, 160).

At the conclusion of the Bank's case in chief, the Martins moved for a directed verdict, stating that the Bank had not proved its case. The court overruled the motion. The Martins' exception to its ruling was noted for the record (Tr. 163-166, 170, 186).

Prior to presenting any evidence and out of the presence of the jury, the Martins proffered evidence regarding the reasonableness and validity of the foreclosure sale (Tr. 173, 175-183). Counsel for the Bank objected (Tr. 174, 183-185). The court sustained the Bank's objection, finding that the issues the Martins currently were questioning were not properly before the court in that they had not been raised by the pleadings (Tr. 170-171, 186-187).

In their defense, the Martins introduced a year-end loan history indicating a zero principal balance on their loan. Moore, who was the only witness to appear on the Martins' behalf, testified that the loan history, which was issued after the foreclosure sale, was a standard accounting procedure of the Bank, showing the amount written off the Martins' account in order to zero their account and transfer the balance to the Bank's records (Tr. 157-159).

The Martins also introduced credit memos totalling $644,115.14. Moore explained that the amount of the credits actually applied to the Martins' account did not add up to the $644,115.14 (Tr. 203-205). He further testified that the credit memos were the internal transactions through which the Bank cleared the Martins' account and that they in no way reflected actual cash received from or on behalf of the Martins (Tr. 216). Referring to his notes on the payment history, Moore stated that the last payment made by the Martins was received in May of 1991,

leaving a balance of $594,495 in principal, plus interest and late fees (Tr. 209-210). Then, when the property was foreclosed on in December, 1991, the net sales amount of $482,561.88 was applied to the balance due on the note, leaving a deficiency of $159,192.57 (Tr. 217, 214).

At the conclusion of the Martins' evidence, counsel for the Bank moved to strike, stating that the Bank had proved its case and that there were no facts in issue for the jury to determine (Tr. 234-236). The court sustained the motion, finding that the Martins were indebted to the Bank in the principal amount of $159,192.57 together with interest at 8% which was calculated to be $10,990.70. The court declined to rule on the matter of attorneys' fees at that time, requesting that each party submit a letter to the court on that issue. The Martins duly objected to the court's ruling and their objection was noted for the record (Tr. 239-242).

On December 9, 1993, after reviewing the respective letter briefs on the matter of attorneys' fees and hearing oral argument, the court entered its final judgment order awarding the Bank the sum of $170,183.27 principal and interest through October 15, 1993, and attorneys' fees in the amount of $42,545.82. The Martins objected to the entry of the final order, and timely filed a Notice of Appeal to the Supreme Court of Virginia (Record 184-186, 193).

In their Petition for Appeal, the Martins contended that the trial court committed reversible error when it failed to grant their motion for summary judgment at the conclusion of the Bank's evidence. They raised two questions regarding due process in support of their contention. These questions are recited in the Martins' Petition for Writ of Certiorari on pages 35 and 36.

The Bank, in its Brief in Opposition to the Petition for Appeal, maintained that the trial court properly denied the Martins' motion for summary judgment in that at the conclusion of the plaintiff's

evidence there were still material facts in dispute. Regarding the due process questions, the Bank maintained that the Martins' arguments were without merit because these issues were never raised prior to trial.

Upon review of the Record and consideration of the arguments of both parties, the Supreme Court of Virginia found no reversible error and denied the Petition for Appeal. The Martins' Petition for Rehearing was also denied.

On June 22, 1994, the Martins filed a Notice of Appeal of their intention to appeal this case to the United States Supreme Court. On August 10, 1994, counsel for the Bank received a copy of the Martins' Petition for Writ of Certiorari, which was refused by the clerk for being in improper form. On August 30, 1994, counsel for the Bank received another Petition from the Martins. Apparently, this Petition, too, did not conform to the requirements of the Rules of the Supreme Court of the United States, in that on September 15, 1994, counsel for the Bank received yet another Petition from the Martins which was postmarked September 12, 1994. This Petition did not contain a Certificate of Service and the content thereof contained substantial changes from the prior two Petitions. In each instance, counsel received only one copy of the Petition.

SUMMARY OF ARGUMENT

I. This case presents no substantial federal question for review and so fails for want of jurisdiction.

II. The questions presented by Petitioners were not properly before the trial court and cannot be raised for the first time on appeal.

III. Because Petitioners have failed to comply with the provisions of Rules 13 and 33 of the Rules of the Supreme Court of

the United States their Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. and II.

This case presents no substantial federal question for review. It concerns an action at law for a deficiency on a note. The dispute arises over procedural, rather than substantive, issues.

Simply stated, the Respondent filed a Motion for Judgment against the Petitioners. The issue was joined when the Petitioners filed an Answer and Grounds of Defense. Petitioners' responsive pleading constitutes nothing more than a general denial to the allegations contained in the Motion for Judgment. It raises no defenses whatsoever.

Among the grounds for denial of a writ of certiorari is that the lower court's decision may be supportable as a matter of state law. *Maryland v. Baltimore Radio Show,* 388 U.S. 912, 94 L. Ed. 562, 70 S. Ct. 252 (1950). In order to raise a federal question, the federal and constitutionally guaranteed rights allegedly infringed upon must be asserted according to state procedure. *Cousins v. Wigoda,* 419 U.S. 477, 21 L. Ed. 2d 595, 95 S. Ct. 541 (1975); *Atlantic C.L.R. Co. v. Mims,* 242 U.S. 532, 61 L. Ed. 476, 37 S. Ct. 188 (1917); *Louisville & N.R. Co. v. Woodford,* 234 U.S. 46, 58 L. Ed. 1202, 34 S. Ct. 739 (1914).

Regarding Virginia procedure, Rule 1:4(d) of the Rules of the Supreme Court of Virginia, 1950 Code of Virginia, states:

> Every pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the

> opposite party of the true nature of the claim or defense.

Further, the purpose of the grounds of defense is to apprise the plaintiff of the defenses upon which the defendant intends to rely. *Lumbermen's Mutual Casualty Co. v. Hodge,* 205 Va. 36, 135 S.E. 2d 187 (1964); *Stegal v. Union Bank, Etc., Trust Co.,* 163 Va. 417 (1934). A defendant cannot set up a defense which has not been stated with sufficient particularity so as to advise the plaintiff thereof. *Stegal, supra.* Pleadings are as essential as proof; no relief can be granted if same does not substantially accord with the case as made in the pleadings. *Ted Lansing Supply Co. v. Royal Aluminum & Construction Corp.,* 221 Va. 1139, 277 S.E. 2d 228 (1981); *Potts v. Mathieson Alkali Works,* 165 Va. 196, 181 S.E. 521 (1935). In not allowing the Petitioners to introduce certain evidence regarding the foreclosure sale and the attorneys' fees, the trial court was simply following established principles of practice and procedure. It did not commit reversible error because the Petitioners never met the threshold requirements relative to pleadings.

III.

Petitioners have failed to comply with the provisions of Rules 13 and 33; their Petition should be denied.

On June 10, 1994, the Supreme Court of Virginia denied the Petition for Rehearing. On August 10, 1994, counsel for Respondent received one copy of the Martins' Petition for Writ of Certiorari. Thirty-nine of the forty copies, as well as a copy of the Rules, were returned by the Clerk for failure to comply with the Rules of Court. On August 30, 1994, counsel for Respondent received one revised copy of the Petition. The text of this revised Petition contains one sentence which was not in the original. On September 15, 1994, counsel for Respondent received one copy of

yet another revised Petition. The text of this second revised version deviates substantially from the prior submissions in that an entire section (Section H., pages 32-36) has been added.

Rule 33.7 of the Rules of this Court states that the clerk shall refuse any document which does not comply with the printing requirements. Any document so refused shall not be deemed untimely if promptly resubmitted in proper form. The underlying presumption is that the revised document shall differ from the original only in form; it shall not contain new and/or different text. Theoretically, if this were not so, one could knowingly dash off an improperly prepared Petition for Writ of Certiorari on the last day of the filing period, have same rejected by the Clerk pursuant to the provisions of Rule 33.7, then resubmit another Petition containing more detailed information than the original and still be timely filed. This process could conceivably be repeated to the extent that the final version of the Petition no longer bears a resemblance to the original Petition. These sorts of actions are a burden on and prejudicial to the Respondent when he is formulating a thorough and proper Brief in Opposition to the Petition.

Interestingly, this appears to have happened in the case at bar. Three separate Petitions have been submitted in this case. The original and the first revision are essentially the same, and were filed within the time limits set forth in Rule 13 of the United States Supreme Court Rules. The second revision, however, differs substantially from the first two submissions and contains additional material. Further, this edition was postmarked September 12, 1994. If, indeed, this final edition is a separate and distinct Petition, and it is Respondent's contention that this is so, then the Petitioners missed the filing deadline by four days. Rule 13, sections .1 and .4.

CONCLUSION

Based on the arguments more particularly set out in the foregoing section, the Respondent respectfully requests the following:

1. that this Court deny the Petition for Writ of Certiorari;

2. that the Respondent be awarded its costs and fees associatd with this Court; and

3. that sanctions be assessed against the Petitioners for failure to comply with the Rules of this Court.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

GEORGE GILMORE MARTIN and
JULIA S. MARTIN

Petitioner,

vs.

BANK OF FLOYD

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

Reply Brief To Respondent's Brief In Opposition

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BEST AVAILABLE COPY

The Bank of Floyd's reasons for denying the Martins' Petition for Writ of Certiorari are not valid for the following reasons:

I

The Martin's case presents substantial due process issues vitially affecting over 50,000,000 Americans with mortgage liabilities exceeding 2.5 Trillion dollars. The Supreme Court of the United States by deciding this case in favor of the Martins can give over 50 million Americans, in the words of Justice William O. Douglas, "some assurance that they will not be saddled with more than the amount of their obligations". Gelfert v. National City Bank, 61 S. Ct. Rep. 898 (1941). In this case, the Bank of Floyd has recovered property worth by its own estimate $863,350, plus a judgment for $212,729, making for a total recovery by the Bank in property and money of $1,076,079, all for a debt valued at $641,754.

In other words, the Bank of Floyd is seeking to be paid $434,325 more than it is owed!!!

Millions of Americans need the U. S. Supreme Court to assure them that something like this will not happen to them too.

II

The Bank states that the Martins are procedurally unfortunate in not raising certain issues as affirmative defenses in certain pleadings. However, the Bank of Floyd's Complaint basically alleged the Martins owed the Bank money. The Martins filed an Answer denying that the Martins owed any money to the Bank. At trial, the Bank, during its case in main, never proved the Martins owed any money to the Bank, because the Bank failed to introduce any evidence that the value of the mortgaged property was less than what the Bank was owed. The Bank did, during its case in main, produce evidence of what the Bank paid itself for the property at a so-called "sale". However, this evidence was immaterial and irrelevant toward the Bank

proving that the Martins constitutionally owed any money to the Bank, which could only have been proven by the introduction of evidence by the Bank that the value of the mortgaged property was less than what the Bank was owed.

It was incumbent on the Bank to prove this fact as a part of its case. It failed to do so and, thereby, lost its case against the Martins, whose motion for a directed verdict at the conclusion of the Bank's case in main should have been granted by the trial court. The Bank now, artfully, tries to put up a smoke screen by saying its failure to prove its case was something that the Martins had to raise procedurally as an affirmative defense. But, the hard fact remains that the Bank never proved the Martins owed any money to the Bank because it never introduced any evidence that the property was worth less than the Bank was owed. Therefore, no defense by the Martins was

necessary.

Contrary to the assertion of the Bank, the Martins did comply with the Virginia Rules of Procedure mentioned by the Bank, because the Martins filed an Answer denying "every allegation not specifically admitted herein" and demanding "strict proof of each such allegation". There was no proof, at trial by the Bank, that it was constitutionally owed any money, so the Bank lost, making it moot for the Martins to put on a defense.

III

The final version of the Martins' Petition is substantially the same as the prior two. The only difference (Pages 32-36) was a compression of the trial excerpts found in the appendix of versions 1 and 2.

The Martins could now raise as a procedural issue that the Bank of Floyd's Brief in Opposition should not be accepted, because it violates Rule 33 of the Supreme Court of the United States in that:

(1) there are more than 10 characters per inch therein;

(2) the lines are not double spaced; and

(3) the paper is not 6 1/8 inches wide (it is only 6 inches).

However, in the interest of this matter proceeding to a determination on the substantive constitutional issues by the Supreme Court, the Martins hereby waive any procedural objection thereto and urge the Supreme Court to accept the Bank's procedurally defective Brief.

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